

L9k2CumC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 CAROL A. CUMBERBATCH,

4 Plaintiff, New York, N.Y.

5 v. 19 Civ. 305 (LJL)

6 WILBUR L. ROSS,  
7 Secretary, U.S. Department  
of Commerce,

8 Defendant.

9 -----x Remote Conference

10 September 20, 2021  
11 10:00 a.m.

12 Before:

13 HON. LEWIS J. LIMAN,

14 District Judge

15 APPEARANCES

16  
17 AMBROSE W. WOTORSON, JR.  
18 Attorney for Plaintiff

19  
20 AUDREY STRAUSS  
United States Attorney for the  
Southern District of New York  
21 JEANNETTE A. VARGAS  
Assistant United States Attorney  
22  
23  
24  
25

L9k2CumC

1 THE COURT: Good morning. This is Judge Liman.

2 Matt, do we have the parties on the phone?

3 THE DEPUTY CLERK: Yes. We are all set in the  
4 Cumberbatch v. Ross matter.

5 THE COURT: Who is appearing for plaintiff? Who do I  
6 have on for plaintiff?

7 MR. WOTORSON: Yes, plaintiff's counsel is here.

8 THE COURT: Who is on for plaintiff? Name, please.

9 MR. WOTORSON: I'm sorry. Ambrose Wotorson for the  
10 plaintiff. I'm sorry, your Honor.

11 THE COURT: Good morning, Mr. Wotorson.

12 MR. WOTORSON: Good morning.

13 THE COURT: And for defendant.

14 MS. VARGAS: Good morning, your Honor. This is  
15 Jeannette Vargas, from the U.S. Attorney's office for  
16 defendant.

17 THE COURT: Good morning.

18 So I have in front of me the motion for summary  
19 judgment. I am prepared to give you a ruling from the bench,  
20 and then we can discuss next steps. I am going to read the  
21 opinion.

22 Defendant Wilbur Ross moves pursuant to Federal Rule  
23 of Civil Procedure 56 for summary judgment. Except where  
24 otherwise indicated, the following facts are undisputed for  
25 purposes of this motion. The Court construes the facts in the

L9k2CumC

light most favorable to the nonmoving party. The Court grants the motion in part and denies it in part.

The plaintiff, Ms. Cumberbatch, who is an African-American woman, was the Regional Survey Manager in the New York region for the U.S. Department of Commerce from February 6, 2017 until her termination on December 27, 2017. At the time, she was 55 years old. Her primary task was to oversee the conduct of field surveys; at any given time, she might have been supervising 100 to 150 surveyors. Plaintiff was supervised primarily by Lance Sanchez and then by Lisa Moore.

Plaintiff alleges that, during the term of her employment, she was subject to a number of adverse employment actions. She also alleges she was terminated from a position as Regional Survey Manager in the New York Regional Office of the U.S. Census Bureau because of her race, gender, and age, and as retaliation for her participation in protected activities. The complaint alleges the following causes of action: claims of race- and gender-based discrimination and retaliation against protected activities in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq.; a claim of race-based discrimination in violation of 42 U.S.C. Section 1981; and a claim of age-based discrimination, in violation of Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 621, et seq.

L9k2CumC

Defendant argues that plaintiff has not met her burden of making out a *prima facie* case of discrimination on the basis of race, sex, age, or retaliation from protected activities. It claims that the majority of the incidents upon which plaintiff relies, such as not being able to attend certain optional training meetings and delays in the approval of her leave requests or the processing of her compensatory time are of a *de minimis* nature and do not rise to the level of a materially adverse action. It also argues that no inference of unlawful racial, gender, or age discrimination can be drawn because none of plaintiff's supervisors ever used racial epithets or racially charged, sexist, or ageist language towards her or made any statements suggesting that their actions were based on plaintiff's race, gender, or age. She also has not identified any relevant comparators. Finally, it argues that her termination was not retaliatory because her supervisors had no knowledge of her alleged contact with human resources.

Plaintiff responds that while she was terminated based on her tone, there were few, if any, contemporaneous complaints about her conduct and that her frequent requests for training -- which were made because she perceived that non-black and younger similarly situated employees had received such training -- engendered unnecessary hostility towards her and led in part to racially and sexually stereotyped

L9k2CumC

1 perceptions that plaintiff was an angry and argumentative black  
2 woman with an attitude that led to her termination.

3 "The same core substantive standards apply to both  
4 Title VII and Section 1981 claims." *Moore v. City of New York*,  
5 745 F.App'x 407, 409. Under Title VII and Section 1981, the  
6 Court analyzes "race discrimination claims under the three-step  
7 *McDonnell-Douglas* burden-shifting framework . . . first an  
8 employee must present a *prima facie* case of race  
9 discrimination. To establish a *prima facie* case of race  
10 discrimination, the plaintiff must demonstrate that: (1) she  
11 fell within a protected class . . .; (2) she was qualified for  
12 the position she held; (3) she was subjected to an adverse  
13 employment action; and (4) the adverse action occurred under  
14 circumstances giving rise to an inference of discrimination.  
15 Second, if the plaintiff establishes a *prima facie* case, the  
16 burden shifts to the employer to give a legitimate,  
17 non-discriminatory reason for its actions. Third, if the  
18 employer proffers a reason, the plaintiff then has the burden  
19 of showing that the employer's explanation is a pretext for  
20 race discrimination. To defeat summary judgment, the  
21 plaintiff's admissible evidence must show circumstances that  
22 would be sufficient to permit a rational finder of fact to  
23 infer that the employer's employment decision was more likely  
24 than not based in whole or in part on discrimination." That's  
25 *Fletcher v. ABM Building Value*, 775 F.App'x 8, 12. Unlike

L9k2CumC

1 Section 1981, Title VII also covers gender-based discrimination  
2 as well as race-based discrimination; gender-based  
3 discrimination is subject to the same framework of analysis.  
4 "To establish a *prima facie* case of age discrimination under  
5 the ADEA, a claimant must demonstrate that: (1) she was within  
6 the protected age group; (2) she was qualified for the  
7 position; (3) she was subject to an adverse employment action;  
8 and (4) the adverse action occurred under circumstances giving  
9 rise to an inference of discrimination'" *Terry v. Ashcroft*, 336  
10 F.3d 128, 137-38.

11 The standards for retaliation under Title VII, Section  
12 1981, and the ADEA are all the same. *Gorzynski v. JetBlue*  
13 *Airways Corp.*, 596 F.3d 93, 110; and *Little v. Northern*  
14 *Utilities Service Company*, 299 F.App'x 50, 52. To establish a  
15 *prima facie* case of retaliation, a plaintiff must prove: "(1)  
16 that she participated in a protected activity; (2) that her  
17 employer was aware of the activity; (3) that an adverse  
18 employment action occurred; and (4) that there was a causal  
19 connection between the protected activity and the adverse  
20 employment action." *Reed v. A.W. Lawrence & Co.* 95 F.3d 1170,  
21 1178. To be materially adverse, the employment action must  
22 have "dissuaded a reasonable worker from making or supporting a  
23 charge of discrimination." *Rochon*, 438 F.3d at 1219.

24 The Court starts with the retaliation claim.  
25 Construing the evidence favorably to the plaintiff, she sought

L9k2CumC

1 to file complaints with defendant's human resources department  
2 in late November and early December 2017 that her managers  
3 created a hostile work environment based on race, gender, and  
4 age. When she asked to file a written complaint about the  
5 hostile work environment, the HR representative, Kimberly  
6 Merrill, told her that she could not file such a complaint and  
7 pursue the employee assistance program at the same time and  
8 told her to think about applying for a new position in the  
9 agency. In plaintiff's words, Merrill did not accept  
10 plaintiff's request that she be permitted to file a complaint  
11 or provide any information or any details. Merrill stated that  
12 plaintiff would have to discontinue the conversation and make a  
13 separate request. She also stated that, in the interim, and  
14 before she filed the complaint, plaintiff should consider  
15 finding another position to work in within the Census Bureau.  
16 Plaintiff also testified that she tried to contact Merrill  
17 three days to a week later to make a complaint about disparate  
18 treatment and that she left voice messages for her but did not  
19 receive a response.

20 Plaintiff's employment was terminated shortly  
21 thereafter, on December 27, 2017, in a meeting with Lisa Moore  
22 and one of her managers, Jared Gerstenbluth. The termination  
23 letter was drafted by Merrill. The letter stated that  
24 plaintiff had time and leave issues, and that in addition she  
25 had "demonstrated inappropriate conduct by displaying

L9k2CumC

1 disrespectful and argumentative behavior with her supervisor."  
2 There are some inconsistencies in the explanations for  
3 plaintiff's termination. One of her supervisors later stated  
4 that although plaintiff was terminated for conduct and  
5 performance issues, the conduct issues were more pervasive, by  
6 which he meant plaintiff "had a very bad attitude and was mean"  
7 and that her "attitude was off-putting." In fact, that  
8 supervisor stated that absences from the office were not an  
9 issue because "there are so many people in the office, there is  
10 always someone available for backup." Another supervisor also  
11 complained that plaintiff's tone was argumentative and that she  
12 was unprofessional. There is evidence that, prior to being  
13 terminated, plaintiff was never told she had time or leave  
14 issues or that she was counseled about alleged tardiness,  
15 leave, or payroll issues. She was not told that she was  
16 repeatedly late. There is an e-mail where she was criticized  
17 for her tardiness and her tone, but that e-mail from Lisa Moore  
18 post-dated her complaints to HR about discrimination. She was  
19 never disciplined or issued a disciplinary notice, memo, or  
20 report while employed with defendant. She was not informed of  
21 any shortcomings in her job performance or duties prior to  
22 being terminated and received two satisfactory performance  
23 evaluations. This is the evidence construed favorably to the  
24 plaintiff. She only received compliments from her immediate  
25 supervisors. With respect to her attitude, one of her

L9k2CumC

1 supervisors stated that he provided feedback, although he added  
2 that he did so "very carefully." Numerous managers testified  
3 that they did not recall plaintiff being spoken about poorly  
4 during a management meeting.

5 Defendant does not dispute that plaintiff's contact  
6 with the HR representative constitutes protected activity. To  
7 prevail on a retaliation claim, the plaintiff need not prove  
8 that her underlying claim of discrimination had merit, but only  
9 that it was motivated by a good-faith, reasonable belief that  
10 the underlying employment practice was unlawful. That's *Zann*  
11 *Kwan v. Andalex Group*, 737 F.3d 834, 843. Defendant also does  
12 not dispute that her termination would constitute an adverse  
13 employment action. It disputes only that her employer was  
14 aware of the activity and that there was a causal link between  
15 plaintiff's complaint to HR and her termination. But there is  
16 evidence that before plaintiff was terminated, management  
17 conferred with Merrill and provided documentation to Merrill  
18 and that Merrill reviewed and drafted the termination letter.  
19 There also is evidence that Merrill conferred with plaintiff's  
20 managers in deciding to terminate her and signed her  
21 termination letter. Her supervisors claim that age, sex, and  
22 race played no role with regard to their treatment of her, but  
23 they do not deny in their statements that they were aware of  
24 plaintiff's complaints to Merrill and they do not address  
25 whether the complaints played a role in her termination. They

L9k2CumC

1 are silent with respect to that. The evidence viewed favorably  
2 to the plaintiff permits the inference that the persons who  
3 decided to terminate plaintiff were aware of her complaints  
4 about discrimination. Again, see *Zann Kwan*, 7347 F.3d at 847.

5 Viewing the evidence, again, in the light most  
6 favorable to plaintiff, a reasonable fact-finder could also  
7 find that the termination of her employment following so close  
8 on the heels of her complaints about discrimination was in  
9 retaliation for her complaints about discrimination. *Zann*  
10 *Kwan*, 737 F.3d at 845 (holding that a three-week period from  
11 complaint to termination was sufficiently short to make a *prima*  
12 *facie* case of causation through temporal proximity). There  
13 also are fact questions regarding whether defendant has a  
14 nonretaliatory reason for the plaintiff's termination. The  
15 Court's conclusion is bolstered by the evidence that (1) the  
16 complaints about plaintiff's performance arose after the time  
17 she approached human resources about discrimination; and (2)  
18 the language about "tone" and being "argumentative," which a  
19 fact-finder could find was the basis for the employment action,  
20 could in the context they were used here be understood to be  
21 code words language for someone who rocks the boat to complain  
22 about discrimination, citing *Thelwell v. City of New York*, 2015  
23 WL 4545881 at \*10. Again, the Court construes the evidence in  
24 the light most favorable to plaintiff. Defendant claims that  
25 plaintiff was terminated for valid and legitimate performance

L9k2CumC

1 reasons, but that will be an issue for trial. A fact-finder  
2 could find that those reasons were pretextual in the absence of  
3 any documented evidence that there were complaints about  
4 plaintiff's performance prior to her protected activity or  
5 prior to the protected activity a suggestion that her  
6 performance could lead to her employment not being continued.  
7 For those reasons, the Court will deny summary judgment to  
8 defendant on plaintiff's retaliation claims.

9 The Court will grant summary judgment to defendant on  
10 plaintiff's discrimination claims and hostile work environment  
11 claims. Plaintiff conceded at oral argument, and the Court  
12 would conclude in any event that, with the exception of the  
13 termination of plaintiff's employment, none of the acts as to  
14 which plaintiff complains rise to the level of an adverse  
15 employment action. None of them affected the terms and  
16 conditions of plaintiff's employment. As to her termination,  
17 plaintiff does not identify facts giving rise to an inference  
18 of discrimination. She does not identify a similarly situated  
19 comparator or any racially or gender or age charged language or  
20 any other evidence that would support an inference of  
21 discrimination on the basis of race, age, or gender. Likewise,  
22 she does not allege any facts giving rise to a hostile work  
23 environment because of race, gender, or age. See *Agosto v. New*  
24 *York City Department of Education*, 982 F.3d 86. Her employment  
25 experience was unpleasant, but she does not identify any

L9k2CumC

1 evidence it was made unpleasant for her on the basis of her  
2 race, gender, or age.

3 So that's the ruling of the Court.

4 I am prepared now to give you a trial date for trial  
5 of this action and also a date for the submission of the joint  
6 pretrial order and for the final pretrial conference. I will  
7 give those to the two of you now, and then I will hear first  
8 from the plaintiff and then from the defendant with respect to  
9 any comments or anything they would like the Court to address.

10 MR. WOTORSON: Yes, thank you.

11 THE COURT: No. I'm going to give you the date first,  
12 and then I will hear from you, Mr. Wotorson.

13 MR. WOTORSON: Okay. Okay, okay.

14 THE COURT: The trial date will be March 28 of 2022,  
15 the joint pretrial order will be due March 11, 2022, and the  
16 final pretrial conference will be March 23, 2022, at 4:00 p.m.

17 Mr. Wotorson, for plaintiff.

18 MR. WOTORSON: Yes. Those dates are fine, your Honor.  
19 However, I would request that your Honor send this case also  
20 back to the mediation program. We tried I think once before  
21 and we were not successful, but I think, in light of the  
22 Court's decision, the parties, both parties are probably a  
23 little bit more educated as to what we have and what we don't  
24 have, and we should at least try to get this resolved prior to  
25 trial.

L9k2CumC

1                   THE COURT: I am always in favor of something like  
2 that, but not if the defendant wouldn't be in favor of it,  
3 because otherwise the parties are entitled to a trial of this  
4 action.

5                   Let me hear from the government.

6                   MS. VARGAS: Your Honor, I would have to confer with  
7 my client to determine their settlement position in light of  
8 the Court's ruling. It may be that they are interested in  
9 renewing settlement negotiations, but I think I need to have a  
10 little time to confer with them before I could determine  
11 whether it will be fruitful to go before the mediator. We  
12 don't want to waste anyone's time if our settlement position  
13 hasn't shifted.

14                  THE COURT: That's fair enough. I think lawyers  
15 always need to consult with clients.

16                  How about the parties letting me know by letter by  
17 close of business on October 8 whether they jointly request  
18 referral to the mediation program. You will let me know either  
19 that they jointly request referral to the mediation program or  
20 that there is no request at the moment for referral to the  
21 mediation program. If there is no request for referral to the  
22 mediation program, I don't need to know, and frankly I don't  
23 particularly want to know, which party is resisting mediation.  
24 That is a matter of indifference to me. I said at the  
25 beginning, in response to Mr. Wotorson's comments, that while I

1 L9k2CumC

2 am always in favor of parties trying to reach settlement, I  
3 also recognize that the parties have a right to have cases  
4 litigated and, from my ruling, it should be clear that there  
are triable issues in this case for both sides.

5 Anything further from the government?

6 MS. VARGAS: No, your Honor. We appreciate the time  
7 this morning.

8 THE COURT: Thank you both. Thank you for good  
9 briefing. Everybody stay safe and stay healthy. Thank you to  
10 the court reporter, and have a good afternoon, everybody.

11 MR. WOTORSON: Thank you, your Honor.

12 MS. VARGAS: Thank you.

13 oOo

14

15

16

17

18

19

20

21

22

23

24

25